LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 27 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 720

MELVIN DAVIS REES, JR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

EUGENE F. MULLIN, JR.,
J. PARKER CONNOR,
S. WHITE RHYNE, JR.,
515 Southern Building,
Washington 5, D.C.
Counsel for Petitioner.

Of Counsel:

WALTER L. GREEN,
HENRY A. BABCOCK,
CHARLES A. DUKES, JR.,
Maryland Building,
Hyattsville, Maryland.

INDEX

Subject Index

Reasons for Granting the Writ: Page

I. This Court Has Never Decided Whether the Contents of a Container Made Secure Against Entry and Placed in the Custody of Another Are Constitutionally Protected Against Search Without Warrant or Consent of the Owner, and the Decisions of the Federal Circuits and States Are in Conflict on the Point 1

II. Petitioner Was Condemned to Death by a Jury Which Was Necessarily Influenced by Inadmissible and Prejudicial Evidence Permeating Extensive Pre-Trial Publicity 4

Conclusion 8

Table of Authorities

Cases:

Fay v. *New York*, 332 U.S. 261 (1947) 6

Holzhey v. *United States*, 223 F.2d 823 (5th Cir. 1955) 2, 3

Irvin v. *Dowd*, 366 U.S. 717 (1961) 6

Kennedy v. *Mendoza-Martinez*, 83 S. Ct. 554 (1963) 6

Kesler v. *Department of P.S.*, 369 U.S. 153 (1962) 6

McNally v. *Hill*, 293 U.S. 131 (1934) 7

Metlakatla Indian Community v. *Egan*, 369 U.S. 45 (1962) 6

National A.A.C.P. v. *Button*, 83 S. Ct. 328 (1963) 6

Rees v. *Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962) 3

Sartain v. *United States*, 303 F.2d 859 (9th Cir. 1962), *cert. denied*, 371 U.S. 894 2

State v. *Evans*, 45 Hawaii 622, 372 P.2d 365 (1962) 2

Page

State v. *Zuehlke*, 239 Wis. 111, 300 N.W. 746 (1941) 2

Texas & P. Ry. Co. v. *Pottorff*, 291 U.S. 245 (1934) 5

Times Film Corp. v. *Chicago*, 365 U.S. 43 (1961) 6

United States v. *Blok*, 88 App. D.C. 326, 188 F.2d 1019 (1951) 2

United States v. *Eldridge*, 302 F.2d 463 (4th Cir. 1962) 2

United States v. *Rees*, 193 F. Supp. 849 (D. Md. 1961) 3

United States ex rel. Wissenfeld v. *Wilkins*, 281 F.2d 707 (2d Cir. 1960) 7

Constitutional Provision:

U.S. CONST. amend. IV 2

Miscellaneous:

Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960) 6-7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 720

MELVIN DAVIS REES, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

Petitioner replies to the brief of respondent in opposition to the petition for a writ of certiorari, as follows:

I. This Court Has Never Decided Whether the Contents of a Container Made Secure Against Entry and Placed in The Custody of Another Are Constitutionally Protected Against Search Without Warrant or Consent of the Owner, and the Decisions of the Federal Circuits and States Are in Conflict on the Point.

Respondent's brief, like the opinions of the trial courts which it quotes at length, misconceives the principal issue in the case. The issue is not, as characterized by respondent, ". . . whether or not a husband and wife (petitioner's parents in the instant case) may validly consent to a search of the premises of their own home. . . ." Br. at p. 14. The

issue is whether these parents may validly consent to the forcible entry and search of a closed and locked container rightfully on their premises, where the container does not belong to them and they have not been given the means of legitimate access to it.

Restated, the issue is whether the fourth amendment guarantee of the right to be secure in one's "effects" extends to property which one has attempted to make secure other than on his own person or premises. Respondent argues that there was no violation of petitioner's fourth amendment rights at the threshold of his parents' home but fails to deal with the violation at the hasp of petitioner's padlocked accordion case.

Respondent has attempted to draw factual distinctions in the six lower court decisions cited by petitioner. *Holzhey* v. *United States*, 223 F. 2d 823 (5th Cir. 1955); *Sartain* v. *United States*, 303 F. 2d 859 (9th Cir. 1962), *cert. denied*, 371 U.S. 894; *United States* v. *Blok*, 88 App. D.C. 326, 188 F. 2d 1019 (1951); *State* v. *Zuehlke*, 239 Wis. 411, 300 N.W. 746 (1941); *United States* v. *Eldridge*, 302 F. 2d 463 (4th Cir. 1962); *State* v. *Evans*, 45 Hawaii 622, 372 P. 2d 365 (1962). However, respondent has not obscured the fact that none of the cited cases is distinguishable from the instant case on the *essential issue*. Each of those decisions, like the decision below in the instant case, dealt with a search and seizure of personal property secured by the owner in a closed container in the custody of another, the search being made without warrant or consent of the owner but with the consent of the person having custody of the container. Three of the cases, *Holzhey*, *Blok* and *Evans*, held that the constitutional rights of the owner were violated. The other three, *Sartain*, *Zuehlke* and *Eldridge*, like the decision below in the instant case, held that the constitutional rights of the owner were not violated.

The *Holzhey* case held that a woman defendant's fourth

amendment rights could not be waived by her son-in-law and daughter in whose garage a locked cabinet containing her personal belongings had been placed. In attempting to distinguish *Holzhey*, respondent has adopted the grounds recited by the lower federal and Virginia courts, *i.e.*, that "the search was conducted in an area of the premises set aside for the defendant's exclusive use and for which she paid rent," *United States* v. *Rees*, 193 F. Supp. 849, 854 (D. Md. 1961), and "the defendant was currently renting and occupying the premises." *Rees* v. *Commonwealth*, 203 Va. 850, 865, 127 S.E. 2d 406, 416 (1962). See br. at pp. 6, 11, 12-13. These purported grounds of distinction fly in the face of express language of the court in *Holzhey* adopting the findings of its trial court that the "appellant did not reside in or rent the garage area" and that the homeowners "had exclusive control and possession of that part of the premises." *Holzhey* v. *United States*, 223 F. 2d 823, 826 (5th Cir. 1955).

Respondent also attempts to distinguish the instant case from *Holzhey* and *Evans* on the ground that here the accordion case was not known to be the property of petitioner. Br. at pp. 11, 14. The important thing, of course, is that it *was* known *not* to be the property of the only person from whom the government agents had consent to search it (T. 118). Moreover, the only reason the agents were interested in searching the case was on the theory that it belonged to petitioner (T. 95).

It is quite clear from respondent's treatment of all six cases cited by petitioner that distinctions can be drawn only if the principal issue in this case, common to all of them, is ignored. The fact is that the cases are in conflict among themselves and with the instant case on an important point which has never been decided by this Court—whether the contents of a secured container not on the person or

premises of the owner are constitutionally protected against search without warrant or consent of the owner.

II. Petitioner Was Condemned to Death by a Jury Which Was Necessarily Influenced by Inadmissible and Prejudicial Evidence Permeating Extensive Pre-Trial Publicity.

Respondent challenges the propriety of consideration by this Court of any of the published materials cited by petitioner in appendix A to the petition. Br. at pp. 2, 19. No contention is made by respondent that any of the citations are inaccurate, or that any of the articles cited were not in fact published and circulated in Spotsylvania County. Respondent's sole contention is that this Court should ignore the materials cited in appendix A because they were not cited to the trial judge or reproduced and placed in the record.

Petitioner does not take the position that the trial judge was aware of each and every one of the newspaper articles cited in appendix A. However, petitioner does state that the trial judge was fully aware that extensive reference had been made to inadmissible evidence in pre-trial publicity. The fact of actual publication of the materials in appendix A is easily verified. It has not been denied by respondent. If the fact of publication of these hundreds of newspaper articles be granted, it is inconceivable that the trial judge could have been oblivious to the publicity. Moreover, the record specifically reflects that he was aware of it:

> "[T]he Court recognizes that you have read and heard about this case, it has been on the radio and television and in the newspapers. . . ." (T. 289)

Repeatedly, witnesses and prospective jurors testified before the judge that they had seen and heard pre-trial

newspaper, radio and television reports (T. 9, 29, 33-34, 37, 42, 48, 49, 51, 178, 180-81, 183, 193, 204, 207-08, 224, 228, 237, 246, 253, 276, 293, 310, 325, 337-38, 352). Repeatedly during voir dire of prospective jurors, the judge made reference to pre-trial publicity (T. 179, 180, 183-84, 202, 207, 220, 224, 228, 237, 243, 251, 276, 289, 293, 310-11, 324, 337, 349, 352-53, 363). So thoroughly did the aura of prejudicial pre-trial publicity pervade the proceedings that for counsel to have compiled for the trial court a list of citations similar to that compiled for this Court in appendix A would have been belaboring the obvious. The fact is that the trial judge, fully aware of the extensive pre-trial publicity given to inadmissible evidence, nonetheless concluded that petitioner's constitutional rights were not violated by trial before a jury which had been exposed to such evidence so long as each juror stated that he did not have a "fixed opinion" as to guilt (*E.g.*, see T. 181, 202, 220, 228-29, 289-90).

The purpose of appendix A is not to enlarge the record. It is, rather, to acquaint this Court with a situation of which the trial court was well aware—that the locale of this trial had been saturated with highly prejudicial publicity. The purpose of appendix A, in other words, is to enable this Court to see the background against which the trial court made its decision on petitioner's motions for a change of venue or venire. A court does not and cannot function without reference to the fund of information common to all intelligent men in the community. For this Court to examine the holding of the trial court without reference to the type of information contained in appendix A would be to review a distorted image of the trial court's decision.

Moreover, even without the roots in the record of the articles cited in appendix A, precedent for consideration by this Court of published material neither cited to the trial court nor reproduced in the record may be found in *Texas*

& P. Ry. Co. v. *Pottorff*, 291 U.S. 245, 254 (1934). The Court there took judicial notice of certain issues of the *American Banker's Journal* and the *Commercial and Financial Chronicle* as well as of the *New York Times Index*, published reports of the Comptroller of the Currency, 52 treatises on banks and banking practice and the annual proceedings of the American Bankers Association. In *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 69-72 (1961) (dissent), four members of this present Court considered and discussed articles not reproduced and placed in the record which had appeared in the *Chicago Daily News*, *Chicago Tribune*, *New York Times*, *Collier's*, *Life*, *Chicago Magazine* and *Films in Review*. See also *Kennedy* v. *Mendoza-Martinez*, 83 S. Ct. 554, 576 (1963) (ten *New York Times* articles); *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 47, 59 (1962) (letters from Secretary of Interior); *National A.A.C.P.* v. *Button*, 83 S. Ct. 328, 340 (1963) (statistic from issue of *Southern School News*); *Kesler* v. *Department of P.S.*, 369 U.S. 153, 173 (1962) (statistics from House Subcommittee hearings); *Fay* v. *New York*, 332 U.S. 261, 275, 298 (1947) (statistical table published by Bureau of Census).

In its brief, respondent also points to the fact that in *Irvin* v. *Dowd* a petition for direct review of the state conviction on writ of certiorari had been denied "without prejudice to filing for federal habeas corpus." Br. at p. 21. Implicit in the observation is a suggestion that the Court withhold review of petitioner's state conviction until he, too, has followed the habeas corpus route.

The *Irvin* case, of course, represents the exception rather than the rule. This Court decides many more cases involving state criminal convictions on review of state court judgments than on petition for review of collateral federal habeas corpus proceedings. Reitz, *Federal Habeas Corpus:*

Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461, 473 (1960). Moreover, to force petitioner into a collateral attack on his state conviction in the federal courts would be to introduce a prejudicial issue not present on direct review. Since petitioner is still technically in the custody of the United States (R. 201) serving a term of life imprisonment, his attempt to follow the well-trodden paths of precedent in habeas corpus actions by utilizing that writ to attack the constitutionality of his state conviction and death sentence would almost certainly be met with opposition based on the fact that the object of his suit would not be total release from custody. *Cf. McNally* v. *Hill*, 293 U.S. 131 (1934). While petitioner believes that the Great Writ would be broad enough to encompass his case, it is obvious that the path of habeas corpus for him would be beset by serious perils with possible irrevocable consequences.

Finally, there is no assurance that petitioner, an indigent person (R. 4, 54, 199) dependent on appointed counsel or on the generosity of family and friends, would in a federal habeas corpus action be able to muster sufficient funds to compile photostatic copies of the hundreds of newspaper articles cited in appendix A in order to make the kind of record which respondent seems to think he should have made in the state trial court. It is even doubtful if petitioner would have a constitutional right to the assistance of counsel. See *United States ex rel. Wissenfeld* v. *Wilkins*, 281 F. 2d 707, 715 (2d Cir. 1960).

Conclusion

This case presents issues of great constitutional importance relating to search and seizure and fair trial. Both issues are sharply defined and all facts necessary for their determination are before the Court. The petition for writ of certiorari as to both issues should be granted.

Respectfully submitted,

EUGENE F. MULLIN, JR.,
J. PARKER CONNOR,
S. WHITE RHYNE, JR.,
515 Southern Building,
Washington 5, D.C.
Counsel for Petitioner.

Of Counsel:

WALTER L. GREEN,
HENRY A. BABCOCK,
CHARLES A. DUKES, JR.,
Maryland Building,
Hyattsville, Maryland.